91-1379

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No. 91-

IN THE

Supreme Court Of The United States

October Term, 1991

LLOYD PITTMAN, JR., a minor, by his next friend and father Lloyd Pittman, Sr.; and LLOYD PITTMAN, SR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the discretionary function exception to the Federal Tort Claims Act apply when plaintiff claims the government negligently failed to insulate from lightning a metal building in a public recreational area, and the relevant government engineers and officials state that they never considered lightning protection one way or another - and the electrical engineer for the government testifies that, having now considered it, he would recommend lightning protection?

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2 L. Jayson, Handling Federal Tort Claims §249.06[4], pp. 12-174, 175 (1990) 13

REFERENCES TO OPINIONS BELOW

The United States District Court for Middle District of Georgia granted the defendant's (United States) motion for summary judgment on April 5, 1991, case 90-21-CDL, unpublished.

The summary judgment decision was affirmed without opinion by the United States Court of Appeals for the Eleventh Circuit on November 25, 1991. The result appears in a table at 949 F.2d 1163.

GROUNDS OF SUPREME COURT JURISDICTION

The judgment appealed from was entered on November 25, 1991, by the United States Court of Appeals for the Eleventh Circuit. Rehearing was not sought in the Court of Appeals. This petition for writ of certiorari is authorized by 28 U.S.C. §1254(1).

STATUTES INVOLVED IN THE CASE

28 U.S.C. §2674 provides, in part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances. . . .

28 U.S.C. §2680(a) provides, in part:

> The provisions of this chapter and section 1346(b) of this title shall not apply to -
>
> (a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

STATEMENT OF THE CASE

(i) *Basis for Federal Jurisdiction.*

This lawsuit is brought under the Federal Tort Claims Act, 28 U.S.C. §§2671-80. 28 U.S.C. §1346(b) grants exclusive jurisdiction over such actions to the United States District Courts.

(ii) *Course of Proceedings.*

The complaint was filed against the United States on December 11, 1989, in the United States District Court for the Southern District of Alabama. On March 12, 1990, the case was transferred to the United States District Court for the Middle District of Georgia. The complaint was amended to more clearly state the names of the father and minor son plaintiffs.[1] R1-20.[2] The answer raised, *inter alia*, the discretionary function defense. R1-3.

The United States filed a motion to dismiss, or, in the alternative, for summary judgment on December 21, 1990. R1-24. After briefs were filed, the District Court granted summary judgment to the United States on April 5, 1991. R11-24, 37, and appendix to this petition. The notice of appeal was filed on April 15, 1991. The Eleventh Circuit affirmed without opinion on November 25, 1991. Appendix to this petition.

(iii) *Statement of the Facts.*

On the afternoon of May 16, 1988, Lloyd Pittman, Sr. took his son fishing at Lake Walter F. George in Georgia. Pittman deposition at 7. When they got to the government-owned

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[1]For clarity, the plaintiffs will be referred to as "Lloyd Pittman, Sr." and "Lloyd Pittman, Jr."

[2]References are to volume, document number, and page in the record on appeal in the Eleventh Circuit. All depositions referenced are exhibits to the record on appeal. Rather than repeating "deposition of" each time, references will read "at 12," or "p. 15," for example.

public recreational area at the lake, it was raining, and Lloyd Pittman, Jr. went to the restroom facility at the Park while they were waiting. The facility was partly under a tree and was struck by lightning while the boy was in the facility. (pp. 8, 16). The father found his son unconscious beside the toilet. (p. 8). The boy's injuries were permanent and catastrophic. (pp. 12-15).

The plaintiffs' expert, Dr. Erwin Reinhard, in doing a risk assessment (following the National Fire Protection Association #78, Lightning Protection Code) as to whether or not this facility needed lightning protection, said that he came out with an "R" value of 9.5 out of 10. ("R" value is a risk assessment.) (Depo. at 38). He said that it was negligent not to include lightning protection (p. 46), that protection would have prevented this injury (p. 50), and that the economic cost was "trivial," about $20 (p. 46).

Also submitted was the deposition of Charles W. Point, Jr. Point is a registered professional engineer and master electrician. At p. 14, Point said that lightning strikes in this area are probably more frequent than any other place in the country except central south Florida. Installation of lightning rods of the type Point would recommend would probably cost around $150. (p. 20) "It's my professional opinion as a design engineer that lightning protection should have been afforded to that comfort station." (p. 22) "It's my opinion that it [lightning rod] would have prevented the accident." (p. 26).

The deposition of Thomas Edward Smith, electrical engineer with the Corps of Engineers was taken. He is responsible for electrical design relative to Corps-owned recreation facilities which would include this facility. At p. 9, he said:

> Q. Do you know anything about the lightning protection that the U.S. Government — and I'm talking about the Corps of Engineers — has provided to structures similar to this comfort station over the years?

A. I can only speak from my experience in the years that I've been with the Corps. And in buildings similar to this, I have never considered lightning protection.

Q. Why have you not considered lightning protection for structures similar to this?

A. To my knowledge and information that has been presented to me, it has never been a requirement. Therefore, it's never been considered.

He admitted that lightning protection was clearly recommended under the applicable guidelines and codes. (p. 39). He further stated that the guidelines recommending electrical protection was a well recognized code. (p. 40). He agreed that it might prevent an injury to provide lightning protection. (p. 42). He further stated it would not interfere with anything to protect this facility from lightning. (p. 43).

At pp. 11-12, Smith was asked about the national NFPA 78 Lightning Protection Code of 1986, particularly the Risk Assessment Guide, and he said that — if one was considering lightning — it is an authoritative guide used by his profession. He admitted the Risk Guide indicated a severe risk of being struck by lightning (pp. 19-21). Most importantly, he admitted that — designing the toilet today and using the Risk Guide — he would recommend lightning protection. (*Id.*)

Also deposed was Douglas Carmouche, a Corps of Engineers employee for 29 years, currently a construction inspector. At pp. 20-21, he is asked:

Q. Have you ever looked at any codes to see whether or not it would be recommended that this facility have lightning protection?

A. No, sir.

Q. Why not?

A. Never occurred to me, didn't feel the need, wasn't — what's the word, wasn't enthused in it.

I wasn't interested in it. I didn't recognize the need. I mean why do you not do things. I don't know why I didn't; I just didn't.

Q. I understand, I'm just trying to find out why.

A. I don't have a deliberate reason why I didn't.

At 23, he said:

Q. All right. Do you — was the failure to provide lightning protection on this comfort station, in your judgment, was an economic reason, anything why lightning protection wasn't provided for?

A. No.

Q. That wasn't the reason the decision was made?

A. No.

The deposition of Buck Earnest was taken. He has been employed with the Corps of Engineers since 1965. At p. 10, he stated the facility has always had a metal commode in it (the lightning travelled from the metal roof down the sidewall, and down the metal commode where the boy was sitting at the time.) At pp. 10-11, he also states:

Q. Now, was any consideration given to grounding this facility? I'm talking about lightning protection now.

A. None that I was ever aware of.

ARGUMENT

The discretionary function exception, which shields the government from tort liability for choices made based upon economic, political, or social considerations, does not apply when government officials fail to even consider the issue; i.e., no "discretion" was exercised.

Lloyd Pittman, Jr., was permanently and catastrophically injured by a lightning strike while he was using a metal toilet in a metal outhouse at a federal recreational area. All the relevant government officials concede that they never gave any thought to the need for lightning protection in this area of country (just about the highest risk area for lightning strikes). The District Court erred in applying the discretionary function exception to the FTCA under these facts because no "decision" was made at all by the government; and, certainly not a "decision" based on the weighing of any social, economic, or political policies. The government's design engineer, Smith, admits that — if he had thought about lightning — he would have rated the risk "severe" and recommended protection. And another witness, Carmouche, denied that economics played any role in the "decision" — the only policy argued in the government's briefs.

Petitioners' primary ground for review is under Rule 10.1(a): there exists a conflict between the circuits as to whether the lack of an affirmative balancing of social, economic, and political choices can ever trigger the discretionary function exception. For example, compare *Richardson v. United States*, 943 F.2d 1107, 1111 (9th Cir. 1991) ("The discretionary function exception may apply 'in the absence of a conscious decision.'"), with *Dube v. Pittsburgh Corning*, 870 F.2d 790, 796 (1st Cir. 1989) ("Because there was no exercise of judgment, the government appears to fail the threshold test. . . .") Other cases are cited below. Additionally or alternatively, Rule 10.1(c) may apply because the Eleventh Circuit's affirmance in this case directly conflicts with the FTCA caselaw of this Court: "[c]onduct cannot be discretionary unless it involves an element of judgment or choice." *Berkovitz v.*

United States, 486 U.S. 531, 536, 108 S.Ct. 1954, 1958, 100 L.Ed.2d 531 (1988).

The District Court concluded "that the claims here asserted are barred by the discretionary function exception because the Corps of Engineers conduct in designing and building outhouses involves the permissible exercise of *policy judgment* which would encompass *any decision* made by the Corps of Engineers concerning whether to install lightning rods or electrical grounding." R1-36-2. (emphasis added). The Eleventh Circuit affirmed without opinion. The Courts erred in applying the discretionary function exception because the government, in fact, did *not* exercise *any* judgment or make *any* decision (policy or otherwise) about lighting protection one way or another. The total failure to think about a safety feature cannot possibly invoke immunity, which is based upon the affirmative exercise of social, economic, or political policy considerations.

Each government witness admitted that they simply never thought about lightning protection: never considered the need at all; never weighed any social, economic, or political policy consideration. Smith, the electrical design expert, stated "I have never considered lightning protection." (depo. at 9). Again, at 12, "we don't consider lightning protection." Yet, he admitted that a risk analysis would conclude in a severe rating; he admitted that well-known guidelines and standards recommend such electrical protection as would have prevented this injury; and, he admitted that he would recommend lightning protection if such an analysis had been performed. Also, he admitted that lightning protection would not have hurt or bothered anything. (P. 43).

Buck Earnest, a 25-year veteran of the Corps, admitted that they simply never considered lightning protection. (depo. at 10). He said that there was certainly no policy against lightning protection, and, if the designers had recommended it, such protection could be built. (p. 20). He also stated that the Corps generally follows code recommendations. (p. 25).

Douglas Carmouche, a 29-year veteran, also confessed that he had never studied any codes as relative to recommended lightning protection. (depo. at 20). It "never occurred to me," "I don't have a deliberate reason why I didn't," he explained. (pp. 20- 21). He explicitly stated that the failure to provide lighting protection was *not* based on economic considerations. (p. 23).

The government engaged in no decisional activity at all: the Corps never considered lightning protection one way or the other. Not to even consider a safety feature cannot be said to be an exercise of discretion.

In *United States v. Gaubert*, 499 U.S.___, 113 L.Ed.2d 335, 111 S.Ct. 1267 (1991), the acts that Gaubert complained of were all clearly affirmative choices, which the Court held to be permeated with economic and policy considerations. The concurring opinion by Justice Scalia worried whether the record adequately showed whether government officials actively exercised policy-making considerations; but this *Pittman* record clearly discloses that the government officials did *not* exercise any decisional processes at all. *Gaubert* reiterates the overriding principle that the discretionary function exception is intended to "prevent judicial second-guessing of legislative and administrative decisions *grounded* in social, economic, and political policy," and "when properly construed, the exception protects only governmental actions and decisions *based* on considerations of public policy." 111 S.Ct. at 1273-74; 113 L.Ed.2d at 346-47. (emphasis added). In the case at bar, the government's failure to provide lightning protection is "grounded" or "based" on nothing — no one ever thought about it.

This Eleventh Circuit affirmance even violates its own precedents. In *Alabama Elec. Co-Op., Inc. v. United States*, 769 F.2d 1523 (11th Cir. 1985), the Court reversed the grant of immunity and remanded for a determination of whether the Corps of Engineers, in fact, exercised any policy decisions as a part of its design plans. At 1531, the Court stated:

> Our review of the relevant case authority reveals that social, economic, and political policy may significantly influence a design decision and thus insulate that decision from judicial scrutiny under the discretionary function exception. The cases make it clear, however, that in the absence of such a policy decision, the Corps' engineers must be held to the same professional standards of reasonableness and due care that a private engineer faces when he plies his trade.

At 1537, the opinion concludes:

> We reverse because the district court applied an erroneous legal standard. Although the record in the instant case reveals no policy decision made by the Corps concerning the effect of the dikes on the opposite bank, the district court may in its discretion permit the government to open the record in an effort to show that its actions did in fact involve such policy considerations.

The Petitioners assert that *Dube v. Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989), is directly on point and represents the correct interpretation of the discretionary function exception. The Court held that the Navy, as operator of a shipyard, was not immune from claims for the negligent failure to warn workers' family members ("domestic bystanders") of the dangers of asbestos. The Navy admitted that it simply failed to consider whether or not such a warning would be appropriate. At 796, the Court responded:

> The government concedes that it made no such policy judgment in this case. The government never decided to forgo warning domestic bystanders; it simply failed (negligently, as determined by the trial court) to do so. '[C]onduct cannot be discretionary unless it involves an element of judgment or choice.' *Berkovitz*, 108 S.Ct. at 1958. . . . Because there was no exercise of judgment, the government appears to fail the threshold test of establishing that

its conduct was protected from liability under the exception.

Discussing the "no consideration at all" issue, the Court further explained at 799-800:

> When the government is operating in a capacity so highly analogous to private industry, we doubt that the 'susceptible of discretion' analysis can protect an official's negligent failure to act without an affirmative exercise of policy judgment, or without an express statutory preservation of the scope of an agency's discretion.
>
> . . .
>
> The difficulty with the 'susceptible of discretion' approach used by the trial court is indicated by the Court's articulation in *Berkovitz* of the discretionary function standard: 'The discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment.' 108 S.Ct. at 1959. Without an actual decision to forgo protecting or waning domestic bystanders, it is difficult to determine whether even the Navy would consider such a decision a permissible or impermissible exercise of policy judgment. Application of the exception where the agency fails to make a judgment threatens to turn the mandate of *Varig Airlines* on its head. As the Court there stated:
>
> > Judicial intervention in such decision making through private tort suits would require the courts to 'second-guess' the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policy-making that the discretionary function exception was designed to prevent.

> 467 U.S. at 280, 104 S.Ct. at 2768. But where there is no policy judgment, courts would be 'second-guessing' by implying one.
>
> Beyond the lack of a Navy policy judgment, the nature of a putative policy not to warn domestic bystanders is highly speculative. We do not need to enter the policy-making arena to observe that it is difficult to imagine the Navy justifying a decision not to issue a simple warning to domestic bystanders of such potentially devastating danger, based on economic or other policy grounds.

"The *Berkovitz* and *Dube* decisions appear to recognize that . . . the lack of a safety decision is not 'discretion." Schwartz and Mahshigian, *In the 1990's the Government Must be a Reasonable Person in its Workplaces: The Discretionary Function Immunity Shield Must be Trimmed*, 46 W & L. L. Rev. 359, 370 (1989). See also *Irving v. United States*, 909 F.2d 598, 602 (1st Cir. 1990) ("Recent cases from other circuits support our conclusion that after *Berkovitz* the proper inquiry must center on *the amount of discretion actually* held and *exercised* by the government employee whose actions or omissions are at issue.") (emphasis added).

Another applicable case is *Summers v. United States*, 894 F.2d 325 (9th Cir. 1990) (holding that the Park Service's failure to warn of hot coals from permitted beach fires was not immune). At 328, the Court explained its decision as follows:

> But that selection process is not presented here.
>
> If the Park Service's own assertions are to be believed, it failed altogether to consider the danger to barefoot visitors from hot coals at the time it designed the fire-ring sign. The omission of a warning that might have prevented Kendra's injury was therefore inadvertent — not the product of a choice 'rooted in social, economic, or political policy.' [citations omitted]

> The district court found that consideration of the dangers presented by beach fire remnants to barefoot visitors played no part in the formulation of the changed Park Service policy on fire rings. We hold that the failure to recognize and incorporate consideration of this danger in the development of the new policy is not insulated from review under the discretionary function exception of the FTCA.

In *Earles v. United States*, 935 F.2d 1028 (9th Cir. 1991), the 2-1 majority remanded to the district court for consideration of whether the Navy's decision not to illuminate certain buoys was a decision implicating the discretionary function exception. The dissent would have decided on the existing record that the exception could not apply because "the government has failed to show that its failure to light the moving buoy was a 'decision' at all. The government has no evidence that suggests that any official was ever faced with the question whether to light some buoys but not others, or made a decision between certain costs and competing safety concerns." 935 F.2d at 1032-33. Judge Pregerson concluded that, "Absent an actual decision by a government officials regarding the lightning of the buoys, the exception simply does not apply". *Id.* at 1033 [citing *Dube*] (Inexplicably, Judge Pregerson had concurred in the contradictory *Kennewick, infra*, opinion two years earlier.) Petitioners suggest to this Court that this is the better view of the discretionary function exception.

Yet, it is the Ninth Circuit which earlier rejected the plaintiff's argument that the government must show it actually considered economic factors (or weighed political or social values). *Kennewick Irrigation District v. United States*, 880 F.2d 1018, 1028 (9th Cir. 1989), cites cases from the Third, Sixth, and Tenth circuits in support of this view. It counts the First (*Dube*) and, ironically, Eleventh Circuits (*Alabama Electric*) as contrary jurisdictions. [*Richardson v. U.S., supra*, followed *Kennewick*. Richardson filed a petition for writ of certiorari to this Court on November 29, 1991. Case 91-942, 60 USLW 3509.]

Because the government failed to consider anything regarding lightning protection, it made no "decision" at all, and certainly not a "decision" based or grounded on "social, economic, or political policy." Thus, the discretionary function exception is inapplicable, and this case is due to be reversed and remanded for trial on the merits of the negligence claim. Petitioners urge that cases such as *Dube* represent the better reasoning and come closer to fulfilling the beneficial and remedial purposes of the FTCA.

It was error to grant and affirm summary judgment on this record, because, "Where it is not definite whether the acts giving rise to the claim are covered by discretion exercised in the adoption of the overall design or plan, or where it is not clear at what point, *if at all*, the discretion so exercised was exhausted, it is appropriate for the Court to withhold final determination on the issue until evidence has been taken from which all the facts may be deduced." (emphasis added) 2 L. Jayson, Handling Federal Tort Claims §249.06[4], pp. 12-174, 175 (1990). Furthermore, it is clear that the "non-decision" not to provide lightning protection or to maintain reasonably safe toilet facilities was not based upon social, economic, or political policies.

CONCLUSION

Petitioners request their petition for writ of certiorari be granted and that the Eleventh Circuit be reversed because a total failure to even consider lightning cannot be a discretionary decision based on economic, political, or social policy.

Respectively submitted,

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APPENDIX

United States Court of Appeals
for the Eleventh Circuit

No. 91-8337
Non-Argument Calendar

D. C. Docket No. 90-21-COL

LLOYD PITTMAN, JR.,
Lloyd Pittman, Jr., b/n/f
Lloyd Pittman, Sr.,
LLOYD PITTMAN, SR.,

Plaintiffs-Appellants

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Georgia

Before FAY, ANDERSON and COX, Circuit Judges.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 34-3;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED THAT plaintiffs-appellants pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: November 25, 1991
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McDabb
Deputy Clerk

ISSUED AS MANDATE: DEC. 17, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

LLOYD PITTMAN, JR., a minor, to wit: 10 years of age, who sues by his next friend and father, Lloyd Pittman, Sr., and Lloyd Pittman, Sr.,	*	CIVIL ACTION NO. 90-21-COL
Plaintiffs	*	Filed at 1:00 PM APR 5 1991
vs.	*	/s/ C. Parker DEPUTY CLERK U.S. DISTRICT COURT MIDDLE DISTRICT OF GEORGIA
UNITED STATES OF AMERICA,	*	
Defendant	*	

MEMORANDUM AND ORDER ON MOTION
FOR SUMMARY JUDGMENT

This action seeks damages from the United States for personal injuries sustained as the result of an accident in which an outhouse (comfort station or pit toilet facility) built by the U.S. Corps of Engineers was struck by lightning, it being the Plaintiffs' contention that the United States is liable under the Federal Tort Claims Act for negligently designing and building the outhouse without lightning rods or electrical grounds.

The Defendant has filed a motion for summary judgment in its favor on the ground that the Plaintiffs' claims challenge purely discretionary conduct of the Corps of Engineers in performance of its statutory authority to design and construct buildings at its facilities, and in consequence, the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a), bars the Plaintiffs' claims.

There is no controversy concerning the material facts. Lloyd Pittman, Jr. was injured on May 16, 1988, at Cool Branch Park near Georgetown, Georgia, when lightning struck a tree and flashed over to an outhouse or pit toilet facility designed and

built by the U.S. Army Corps of Engineers on its recreational property adjacent to the Chattahoochee River. Pittman was in the outhouse facility when the lightning struck. The outhouse facility was designed and built by the Corps of Engineers in the early 1960's.

No federal statutes, regulations, policies, or required safety codes were violated in the design and construction of the outhouse and no other Corps of Engineers buildings on the entire Walter F. George Reservoir and management area have lightning protection devices.

The Federal Tort Claims Act is a limited waiver of sovereign immunity permitting suits against the United States to recover damages caused by the negligent act or omission of a federal employee, but the Act contains several express exceptions which were designed explicitly to preserve the immunity as to certain claims. One of these exceptions is the discretionary function exception set forth in 28 U.S.C. § 2680(a), and a claim which falls within the purview of this exception is barred by lack of subject matter jurisdiction.

It is the Court's view that the claims here asserted are barred by the discretionary function exception because the Corps of Engineers conduct in designing and building outhouses involves the permissible exercise of policy judgment which would encompass any decision made by the Corps of Engineers concerning whether to install lightning rods or electrical grounds.

Although the Court of Appeals for the Eleventh Circuit has not yet addressed the specific factual situation involved in this case, it has held in a number of cases that the discretionary function exception applies to a number of governmental activities, and some of those decisions clearly indicate that the exception should be applied in this case. *Ostera v. United States,* 769 F.2d 716 (11th Cir. 1985); *Alabama Electric Cooperative, Inc. v. United States,* 769 F.2d 1523 (11th Cir. 1985); *Heller v. United States,* 803 F.2d 1558 (11th Cir. 1987); *Brackin v. United States,* 913 F.2d 858 (11th Cir. 1990); *Hart v. United States,* 894 F.2d 1539 (11th Cir. 1990).

Consistent with the foregoing, the Defendant's motion for summary judgment is sustained.

IT IS SO ORDERED, this 5th day of April, 1991.

/s/ W. Robert Elliott

UNITED STATES DISTRICT JUDGE

(2)

Supreme Court, U.S.
FILED
APR 29 1992
OFFICE OF THE CLERK

No. 91-1379

In the Supreme Court of the United States

OCTOBER TERM, 1991

LLOYD PITTMAN, JR., ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Tort Claims Act's discretionary function exception, 28 U.S.C. 2680(a), bars a suit alleging that the Army Corps of Engineers failed to provide adequate lightning protection when it constructed a comfort station at a federal recreational property.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1379

LLOYD PITTMAN, JR., ETC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. A1-A2) is unreported, but it is noted at 949 F.2d 1163 (Table). The opinion of the district court (Pet. App. A3-A5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1991. The petition for a writ of certiorari was filed on February 24, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On May 16, 1988, petitioner Lloyd Pittman, Jr., was seriously injured when lightning struck a tree and flashed over to a comfort station he was using at Cool Branch Park, a federal recreational property located on the Chattahoochee River near Georgetown, Georgia. The Army Corps of Engineers designed and erected the structure in the early 1960s. The Corps' design and construction did not violate any federal statutes, regulations, policies, or required safety codes. No other Corps buildings in the area have lightning protection devices. Pet. App. A3-A4.

Petitioner and his father brought this action against the government under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, alleging that the Corps was negligent because it failed to install a lightning rod on the comfort station and that the Corps' negligence was the cause of petitioner's injuries. The United States moved to dismiss the complaint on the ground that the FTCA's discretionary function exception, 28 U.S.C. 2680(a), bars a negligence suit based on the Corps' design and selection of safety features. Petitioners responded that the discretionary function exception was not applicable because the Corps had never actually considered whether to install a lightning rod and therefore did not in fact exercise discretion.

The district court rejected petitioners' argument and dismissed their complaint. Pet. App. A3-A5. The court concluded that "the Corps of Engineers conduct in designing and building outhouses involves the permissible exercise of policy judgment which would encompass any decision made by the Corps of Engineers concerning whether to install lightning rods or electrical grounds." *Id.* at A4. The court of appeals affirmed that decision without an opinion. *Id.* at A1-A2.

ARGUMENT

1. This Court's decision in *Berkovitz* v. *United States*, 486 U.S. 531 (1988), established a two-part test for applying the discretionary function exception. A court must "first consider whether the action is a matter of choice for the acting employee." *Id.* at 536. If the employee is required to follow a course of action that is specifically prescribed by a federal statute, regulation, or policy, the discretionary function exception does not apply. *Ibid.* If the challenged conduct involves an element of judgment, then the court must additionally determine whether the challenged conduct is of the kind that the discretionary function exception was designed to shield. *Ibid.* "The focus of the inquiry is * * * on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States* v. *Gaubert*, 111 S. Ct. 1267, 1275 (1991).

The Corps' selection of lightning protection features for its facilities is a "matter of choice." No federal statutes, regulations, policies, or required safety codes mandate the installation of lightning protection devices. Pet. App. A4. Additionally, the selection of safety features for federal structures is the type of discretionary decision that is "susceptible to policy analysis." The decision to install appropriate lightning protection devices to federal facilities requires a weighing of social costs and benefits, including assessment of factors such as the probability that lightning might strike the structure, the effectiveness of the safety device, and the costs of design and installation. The courts below therefore correctly held that the discretionary function exception applies to this case and bars this lawsuit. See, *e.g.*, *United States* v. *Varig Airlines*, 467 U.S. 797, 820 (1984).

2. Petitioners contend (Pet. 6) that the discretionary function exception does not protect the United States from liability if the government agents have not actually

considered the specific safety device at issue. That contention, however, is inconsistent with the explicit language of the exception, which bars liability based on a "failure to * * * perform" a discretionary function. 28 U.S.C. 2680(a). If the consideration of safety matters in the design and construction of a public facility is a decision "grounded in social, economic, and political policy" that is protected under the exception, *United States* v. *Gaubert*, 111 S. Ct. at 1273, then the "failure to" consider such safety devices is also protected under the exception.

The FTCA's discretionary function exception bars suits based on matters involving policy judgments. It does not depend on whether the government explicitly makes such a judgment. As this Court noted in *Dalehite* v. *United States*, 346 U.S. 15, 36 (1953) (quoted with approval in *Berkovitz*), "[w]here there is room for policy judgment and decision there is discretion." Thus, "the basic inquiry concerning the application of the discretionary function exception is whether the challenged acts * * * are of the nature and quality that Congress intended to shield from tort liability." *United States* v. *Varig Airlines*, 467 U.S. 797, 813 (1984). Accordingly, " 'the relevant question is not whether an explicit balancing is proved, but whether the decision is susceptible to policy analysis.' *United States Fidelity & Guar. Co.* [v. *United States*, 837 F.2d 116], 121 [(3d Cir.), cert. denied, 487 U.S. 1235 (1988)]." *In re Joint Eastern & Southern Districts Asbestos Litigation*, 891 F.2d 31, 37 (2d Cir. 1989). Accord *United States* v. *Gaubert*, 111 S. Ct. at 1275.

Petitioners do not dispute that the government's design and construction of public facilities on public lands—and specifically, the government's determinations whether to incorporate safety devices—involve matters where "there is room for policy judgment and decision." Because those determinations are protected

by the discretionary function exception, the failure to make them is similarly protected.

3. Contrary to petitioners' claims, there is no conflict among the circuits on the question petitioners present. The courts of appeals are in agreement that the discretionary function exception encompasses a failure "to even consider" (Pet. 6) a matter of policy. See, *e.g.*, *In re Joint Eastern & Southern Districts Asbestos Litigation*, 891 F.2d at 37 ("it is unimportant whether the government actually balanced economic, social, and political concerns in reaching its decision"); *United States Fidelity & Guaranty Co.* v. *United States*, 837 F.2d 116, 120-121 (3d Cir.), cert. denied, 487 U.S. 1235 (1988) (where the subject matter of the activity involves policy considerations, "it is irrelevant whether the government employee actually balanced economic, social, and political concerns in reaching his or her decision"); *Allen* v. *United States*, 816 F.2d 1417, 1422 n.5 (10th Cir. 1987), cert. denied, 484 U.S. 1004 (1988) (it is "irrelevant whether the alleged failure to warn was a matter of 'deliberate choice,' or a mere oversight").[1]

Petitioners attempt to find support for a contrary result in First Circuit precedent. Pet. 9-11. The First Circuit follows the approach of the other courts of appeals. Thus, "where the government is involved in regulating private conduct and protecting the public from danger, 'the government's failure to consider to undertake a greater level of care generally remains within the exception." *Irving* v. *United States*, 909 F.2d 598, 602-603

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[1] See also, *e.g.*, *In re Ohio River Disaster Litigation*, 862 F.2d 1237, 1247 (6th Cir. 1988), cert. denied, 493 U.S. 813 (1989), and *Myslakowski* v. *United States*, 806 F.2d 94, 97 (6th Cir. 1986), cert. denied, 480 U.S. 948 (1987) ("[e]ven the negligent failure of a discretionary government policymaker to consider all relevant aspects of a subject matter under consideration does not vitiate the discretionary character of the decision that is made").

(1990), quoting *Dube* v. *Pittsburgh Corning*, 870 F.2d 790 (1st Cir. 1989). The court recognized a narrow departure for the general principle in *Dube*, stating that the United States could not rely on the discretionary function exception in operating an industrial shipyard without an affirmative exercise of policy judgment, because it was "operating in a capacity so highly analogous to private industry." 870 F.2d at 799. The court made clear, however, that an affirmative exercise of policy judgment is not required in the usual situation where the government performs "a traditional governmental function." 870 F.2d at 798. In this case, the government was engaged in the "traditional governmental function" of providing recreational facilities on public lands, and hence the decision here does not conflict with *Dube*. See also *Irving*, 909 F.2d at 602-603.[2]

Petitioners also attempt to find support in Ninth Circuit precedent. Pet. 11-12. The Ninth Circuit, however, follows the decisions of the other circuits in holding that an affirmative exercise of discretion is not required. See *Richardson* v. *United States*, 943 F.2d 1107, 1111 (9th Cir. 1991), cert. denied, 112 S. Ct. 1473 (1992), and *Kennewick Irrigation District* v. *United States*, 880 F.2d 1018, 1028 (9th Cir. 1989) (if decisions are the type grounded in social, economic, or political policy, the government need not "prove that it considered these factors and made a conscious decision on the basis of them"); *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 998-999 (9th Cir. 1987), cert. denied,

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[2] Petitioners misinterpret (Pet. 11) the significance of the First Circuit's decision in *Irving*. The court stated that the case did not involve a failure to make a policy decision. Instead, the issue was whether "OSHA compliance officers negligently failed to meet the level of care OSHA had set." 909 F.2d at 603.

485 U.S. 905 (1988) (failure to consider whether to issue warning falls within discretionary function exception).

The cases that petitioner cites, *Earles* v. *United States*, 935 F.2d 1028 (9th Cir. 1991), and *Summers* v. *United States*, 905 F.2d 1212 (9th Cir. 1990), are not to the contrary. In *Earles*, the majority cited *Kennewick* with approval, implicitly rejecting Judge Pregerson's dissenting view that the discretionary function exception should not apply in the absence of a conscious decision. 935 F.2d at 1032 (applying the discretionary function exception to the Suits in Admiralty Act). In *Summers*, the Ninth Circuit reasoned that the agency's failure to implement safety measures was "a departure from the safety considerations established in [Park] Service policies" and, accordingly, there was no conflict with *Kennewick* or *Consolidated Testing*. 905 F.2d at 1216.[3]

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[3] Petitioners also contend, Pet. 8-9, that the Eleventh Circuit's decision in this case conflicts with a prior decision by that court, *Alabama Electric Cooperative, Inc.* v. *United States*, 769 F.2d 1523 (1985). That alleged intra-circuit conflict, however, does not provide a justification for review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, there is no such conflict. The issue in *Alabama Electric* was simply whether particular design decisions were grounded in social, economic, or political policy, and the court remanded for further consideration of the facts of the case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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